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Chairperson: Ms. Chanet

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The meeting was called to order at 10.05 a.m.

General comments of the Committee

Draft general comment on article 14 of the Covenant (CCPR/C/GC/32/CRP.1)

1. **Mr. Kälin**, speaking as the rapporteur for the draft general comment on article 14, recalled that the Committee had decided that the general comment should bring out the links between article 14 and other relevant articles of the Covenant. Some paragraphs shown in a smaller typeface in the English version, had already been adopted in first reading and, only the additions thereto would need to be discussed. Others had not been considered at all; and the comment was thus still at the stage of its first reading.

II. Equality before courts and Tribunals

Paragraphs 6-12

2. **Mr. Kälin** said that the addition to paragraph 7 was a technical one, made in response to the Committee's concern to have it made clear that the principles of competence, impartiality, independence and fairness mentioned in article 14, paragraph 1, applied not only to suits at law and civil proceedings but also to cases brought under domestic law; in addition, since paragraph 8, already adopted, dealt with the necessity of equal access, that also had to be included in paragraph 7 in order for it to be complete. Paragraphs 9, 10 and 11 were completely new texts and would therefore have to be considered in detail. Paragraph 12 had been enriched by an additional example in the matter of equality of arms, following the Committee's discussions.

3. **Mr. Amor** proposed the insertion, in the first line of paragraph 8, following the words "access to the courts", of a new sentence to the effect that access to the public judicial services must, in any event, be recognized and effectively guaranteed so as to ensure that no individual was deprived, in accordance with procedural requirements, of the right to seek justice. That would bring out the right of everyone to equal access to the courts.

4. **Mr. Kälin** agreed to Mr. Amor's addition, which reinforced the general idea of the paragraph.

5. **Mr. Ando**, referring to the question of legal assistance addressed in paragraph 9, said that, in the second sentence, States should be encouraged to provide free legal aid, rather than being obliged to do so.

6. **Mr. Lallah** wondered whether the addition to paragraph 8 proposed by Mr. Amor might not be logically placed at the beginning of paragraph 9 or in a separate paragraph altogether. With regard to Mr. Ando's comment, he said that, according to the Committee's case law, States were indeed under an obligation to provide legal aid.

7. **The Chairperson**, speaking in her personal capacity, stressed that the other cases mentioned in the paragraph referred to cases other than criminal proceedings. The question was whether article 14 placed States under an obligation to provide legal aid in civil proceedings.

8. **Sir Nigel Rodley** said that if Mr. Amor's addition were to respect the hierarchy of the analysis, it should come before paragraph 8. He agreed that, according to the Committee's case law, States were, under certain circumstances, obliged to provide legal assistance; however, the word "may" in the clause beginning "States may be obliged" did offer a way out of any strict obligation.

9. **Mr. Shearer** agreed that paragraph 9 placed too much emphasis on obligation. The High Court had found that, while it did not have the power to enforce article 14, paragraph 3 (d), it could refuse to hear the criminal charges against the accused so long as he was not represented by legal counsel. Legal assistance could be provided by various means, not just through government funding. A more flexible formulation therefore needed to be found.

10. **Mr. Rivas Posada** noted that the difficulty arising in respect of paragraph 9 hinged on the existence of two different situations. In civil cases, obligation was excessive; an encouragement would suffice. In criminal cases, obligation was appropriate. A distinction needed to be drawn between the two.

11. **The Chairperson**, speaking in her personal capacity, emphasized that the obligation in question was a residual one, to be invoked in cases where legal aid was not forthcoming from any other source. The death penalty case cited in paragraph 9 was not a good example; in such cases legal assistance was always in

the interests of justice. Everyone agreed that the question of access should be stressed. Indeed, the subheading should perhaps have been entitled "Access and equality ..." not just "Equality ...". The advantage of the formulation "may be obliged" in paragraph 9 lay in its unconstraining nature.

12. **Mr. Kälin**, speaking in his capacity as rapporteur for the general comment, proposed that a second sentence should be inserted in paragraph 8 after the words "access to the courts". It would read as follows: "Access to judicial proceedings must be effectively guaranteed in all cases in order to ensure that no individual is deprived, in procedural terms, of the right to seek justice". The following sentence would begin with the words "A situation in which ...". He proposed that in the second sentence of paragraph 9 the words "States may be obliged" should be replaced by the words "States are encouraged". That sentence should be followed by a new sentence which would read as follows: "In some cases, they may be obliged to do so". He agreed with Ms. Chanet that, in the next sentence, the words "and where the interests of justice so require" should be deleted.

13. **Mr. Amor** accepted Mr. Kälin's amendment to paragraph 8, though he felt that his own proposal had been more wide-ranging.

14. **Mr. Shearer** welcomed the amendment to the second sentence of paragraph 9 but said that he would delete the word "too". Article 14, paragraph 3 (d), concerned the rights of individuals, not the obligations of States, and although States should ensure, or allow for, free legal aid, they were under no direct obligation in that regard.

15. **Mr. Kälin** agreed that the word "too" should be deleted.

16. **The Chairperson** said that she would personally have preferred to deal with the idea of access before the idea of equality.

17. **Mr. Amor** observed that it would, in fact, perhaps be logical to have a first paragraph on access, another on equality and a third on access to equality.

Paragraph 10

18. **Mr. Amor** observed that the term "judicial" — as used in the second sentence of paragraph 10 and in the context of article 14, paragraph 1, throughout the draft — should be translated by the more inclusive French term "*juridictionnel*" rather than the term "*judiciaire*", which in the court system of a number of countries covered only certain kinds of proceedings.

19. **Mr. Kälin** said that the French text would be amended accordingly.

20. **Mr. Ando** asked what was meant by the words "particular authors" in the second sentence.

21. **Mr. Lallah**, supported by **Mr. Wieruszewski**, observed that the term "author", in the sense of a complainant, was appropriately used only in the Committee's own discussion of communications. In the particular case referred to in paragraph 10, it should be clarified that the winning complainant had been made to pay the other party's costs.

22. **Mr. Kälin** suggested replacing the words "the particular authors" by the word "it", so as to refer to the implications for the winning party.

23. *It was so decided.*

Paragraph 11

24. **Mr. Kälin** said that although the paragraph was not necessary it might be useful to include it, as the Committee's general comments were read also by lawyers unfamiliar with its jurisprudence. He suggested that the Committee might take a decision on the matter later.

25. *Consideration of paragraph 11 was deferred.*

Paragraph 12

26. **Mr. Kälin** said, in reply to the Chairperson's query, that the new text inserted in paragraph 12 had indeed been prompted by the specific communication cited.

III. Fair and public hearing by a competent, independent and impartial tribunal

Paragraphs 13-16

27. **The Chairperson** recalled that paragraphs 13 to 16 had been provisionally approved at a previous session.

28. **Mr. Amor**, reopening discussion of paragraph 16 dealing with the notion of "tribunal", noted that courts could be defined institutionally or by their functions. Currently, the administration of justice worldwide was

not limited to courts but encompassed many other judicial or quasi-judicial bodies that could issue authoritative decisions.

29. **Mr. Kälin**, concurring, proposed that the first sentence of paragraph 16 should be amended to read as follows: "The notion of 'tribunal' in article 14, paragraph 1, second sentence, designates a body, however named, that is established by law, is independent of the executive and legislative branches of government or enjoys judicial independence in deciding particular legal matters in proceedings that are judicial in nature." The last sentence of paragraph 16 was not germane to the issue and should be deleted.

Paragraph 17

30. **Mr. Rivas Posada**, recalling that in paragraph 7, tribunals had been described as competent, independent, impartial and fair, suggested that the notion of fairness should be added to the first sentence of paragraph 17 for consistency.

31. **The Chairperson**, speaking in her personal capacity, suggested that paragraph 17 should start with the second sentence, introducing a new principle and avoiding repetition.

32. **Mr. Kälin**, supported by **Mr. Lallah**, said that since the aim of paragraphs 17 to 21 was to elucidate the second sentence of article 14, paragraph 1, there was no need to add the notion of fairness, which did not appear in that sentence. Accordingly, he agreed that the first sentence of paragraph 17 could be deleted. The new first sentence would then read: "The right to be tried by a competent, independent and impartial tribunal is an absolute right that may suffer no exception.[26]"

33. **Mr. Ando** proposed adding the word ", suspension" after the word "transfer" in what was now the second sentence of paragraph 17.

34. **Mr. Amor** said that the last sentence of paragraph 17 should be redrafted to include elected judges serving limited terms. While the charge of incompetence could be used unjustly against judges as a way of controlling them, he noted that disciplinary measures were sometimes necessary in cases of real incompetence or, more likely, abuse of power. There was, in addition, the issue of customary judges who administered justice in many countries and derived their legitimacy from the community.

35. **Mr. Rivas Posada** observed that the reference in the last sentence should be not to "incompetent rulings" but rather to "incompetent judges".

36. **The Chairperson**, speaking in her personal capacity, said that the question of the disciplining of judges was always a difficult one. Rather than citing the Committee's concluding observations on one State party report, it might be more appropriate to cite in the last sentence the United Nations Basic Principles on the Independence of the Judiciary, which allowed judges to be disciplined for incompetence, but their questionable rulings to be challenged only through the appeals process.

37. **Mr. Solari Yrigoyen** proposed amending what was now the third sentence of paragraph 17 to have States guarantee the independence of the judiciary "through the adoption of constitutional norms and laws", since, especially in the case of the civil law countries, the protection of the independence of the judiciary was often set out in their constitution rather than laws.

38. **Mr. Kälin** said that he would incorporate the amendments proposed by Mr. Ando and Mr. Solari Yrigoyen. He would be glad to change the last sentence of the paragraph to a more general formulation indicating that judges should not be disciplined for incorrect decisions, which it was up to higher courts to rectify; and perhaps also make the point that the independence of elected judges serving fixed terms was particularly threatened by the possibility of being disciplined. Mr. Amor's point regarding customary law judges would best be put into a separate paragraph later in the draft, when the question of military courts and judges came up.

39. **Ms. Wedgwood** said that the call, in what was now the third sentence, for States to protect judges "from any form of political influence", did not seem to be taking into account the fact that some judges were directly elected by voters, which ipso facto introduced a form of political influence. Perhaps it would be better to refer to "any undue form of political influence", or "political influence other than standing for election".

40. On the question of incompetent rulings, in the last sentence, the scope of the power to impeach life-tenure judges who reached some kind of inadmissible judgement was unclear, even in her own country, but account should be taken of that possibility.

41. **The Chairperson**, speaking in her personal capacity, said she believed that the third sentence of the text meant political influence on decisions. The "clear procedures and objective criteria" to be established would not exclude the direct election of judges.

42. **Sir Nigel Rodley** said that he would be reluctant to add language that would invite insecurity of tenure. Although he realized that some jurisdictions did provide for the election of judges, in his view, the only two types of tenure that ensured the independence of the judiciary were a non-renewable term or a life term; anything else, including the prospect of re-election, could jeopardize independence. The focus in the paragraph was on the legislative branch's power of impeachment, which should be governed by rules that discouraged abuse, but there were other factors that influenced independence.

43. **The Chairperson**, speaking in her personal capacity, said that even non-renewable tenure could jeopardize independence if the term was short and a judge had reason to be concerned about the next step in his or her career.

44. **Sir Nigel Rodley** said that one solution would be to spell out the different implications for independence vis-à-vis the executive branch, the legislative branch, the electorate, the judicial supervisory body in some systems, and so forth. However, he was reasonably comfortable with the text as it stood, provided that no language was added that would seem to be encouraging periodic elections of judges.

45. **Mr. Shearer** said that the key point was that political influence should not weigh on judges in deciding particular cases. He suggested inserting the phrase "in their decision-making" after "political influence".

46. **Mr. Amor** said that the last sentence concerning disciplinary measures taken for "incompetent rulings" dealt with an issue that should be approached with caution. In its concern to protect judges the Committee should not overlook the possibility that underlying circumstances might be very different in different countries.

47. **Mr. Lallah** agreed that a mention of election of judges was uncalled for and felt that Mr. Shearer's suggestion would solve the problem. He would be in favour of omitting the last sentence, since it was impossible to envisage all the different circumstances in which the dismissal of a judge might jeopardize independence.

48. **Mr. Bhagwati** said that it would be difficult to identify all the factors that could influence independence in a particular case. It might be sufficient to indicate that judges should not be influenced by political considerations.

49. **Mr. Kälin**, speaking as Rapporteur for the draft general comment on article 14, said that he concurred with the proposal to insert "in their decision-making" after "political influence" in the third sentence and agreed that it was best to delete the last sentence on disciplinary measures for incompetent rulings. Not all Committee members would concur that election of judges jeopardized their independence, but he had thought it best to avoid mentioning the different systems of selecting judges.

Paragraph 18

50. **The Chairperson**, speaking in her personal capacity, said that she supported the last sentence of paragraph 18; it was important — in terms of removing any possible temptation — for judges to be paid adequately and on time.

51. **Mr. Amor**, noting that the last sentence spoke of "adequate salaries" for judges, said that, while judges should be paid well enough to counter temptations to corruption, adequate or reasonable remuneration had to take into account pay scales in the country in question.

52. **Mr. Solari Yrigoyen** said that experience had shown the importance of having the rules and procedure for dismissal of judges set out in the constitution. Moreover, any judge under review for dismissal should be entitled to a defence and to all the other procedural safeguards to which defendants were entitled under article 14 of the Covenant.

53. **Mr. O'Flaherty** agreed that it was important to state that a judge being considered for dismissal had a right to a defence; however, the necessary language concerning "judicial protections being available to contest the dismissal" was already present in the second sentence and could be extrapolated into a self-standing statement. In any case the reference to dismissal of a judge "several years before the expiry of the term for which he had been appointed" was a case in which a particular example was being presented as a general rule; it implied that if that condition was not

met, if it was a matter of months rather than years, for instance, the Committee might consider the dismissal compatible with the independence of the judiciary. In the last sentence, the phrase could be recast as "adequate and reasonable salary in the context of the circumstances of the State party".

54. **Ms. Wedgwood** suggested that the word "only" should be inserted in the first sentence so that it would begin: "Judges may be dismissed *only* for serious and objective reasons ...". She took issue with the inclusion, in the penultimate sentence, of the media in the category of powerful social groups. Surely no one was suggesting that the judiciary should be exempt from public comment and criticism, which it was the role of the media to provide. The media constituted the fourth estate, not an interest group.

55. **Sir Nigel Rodley** said that he was uncomfortable with spelling out the need for punctual payment in the last sentence. Instead of "to grant judges adequate salaries and to pay them on time", he would suggest the wording "to ensure that judges receive salaries commensurate with the dignity and responsibility of their functions".

56. **Mr. Rivas Posada** said that he would be happier deleting the last sentence altogether. In the penultimate sentence, it was not so much undue influence as intimidation by powerful social groups that needed to be guarded against.

57. **Mr. Lallah** concurred with Sir Nigel Rodley's suggestion, except that he would prefer to leave out the mention of "dignity". He wondered if the General Assembly resolution on the independence of the judiciary made any mention of salaries. He was in favour of stating that judges might be dismissed "only" for serious and objective reasons and omitting the mention of "several years before the expiry of the term" in the second sentence, as being too specific. Finally, regarding the penultimate sentence, he wondered what was meant by "positive measures by the State to protect the judiciary".

58. **Mr. Kälin**, speaking as Rapporteur for the draft general comment on article 14, suggested that the first sentence be reworded as follows: "Judges may be dismissed only for serious and objective reasons in accordance with fair procedures set out in the constitution or the law". The specific example in the second sentence could be salvaged simply by preceding it with the words "for example". It might be best to simply delete the penultimate sentence and to reword the last sentence as follows: "Judges should receive remuneration commensurate with the responsibility of their functions".

59. **Mr. Bhagwati** said that he was still uncomfortable with the last sentence, since so much depended on the circumstances of the country.

60. **Mr. Solari Yrigoyen** said that while he could accept the proposed wording of the last sentence he thought it might nonetheless be misinterpreted. With regard to the penultimate sentence, he did believe that in some circumstances the mass media could bring undue influence to bear that could undermine the independence of the judiciary.

61. **The Chairperson**, speaking in her personal capacity, said that in that sentence the word used in the French version was "*intimidation*"; the corresponding words "intimidation" in English and "*intimidación*" in Spanish might better render the Committee's idea.

62. **Ms. Wedgwood** suggested that the penultimate sentence could be recast to read as follows: "It may be necessary to ensure the independence of judges from conflicts of interest and intimidation".

63. **Mr. Kälin** agreed that that would solve the problem for him. He proposed putting the last sentence in square brackets for further considering and moving the last two sentences of paragraph 18 to the end of paragraph 17, since they fit better with the discussion on the independence of the judiciary than with the problems of dismissal.

The meeting was suspended at 12.15 p.m. and resumed at 12.35 p.m.

Paragraph 19

64. **Ms. Wedgwood** said that the expression "subjectively free of personal bias" in the second sentence seemed redundant. Furthermore, in the same sentence, the notion that judges should "not harbour preconceptions about the matter put before them" seemed unrealistic. Judges were informed people and inevitably had opinions. Those opinions should, perhaps, not be publicly announced, especially with regard to a particular case, a particular matter or particular parties. The wording should be made less harsh.

65. **Mr. Kälin** agreed that the word "subjectively" could be deleted but felt that the existing wording with regard to preconceptions already covered Ms. Wedgwood's concerns.

Paragraph 20

66. **Mr. Kälin**, replying to a question from the Chairperson, said that the reference, in the final sentence, to "offences of an exclusively military nature" was meant to cover exclusively offences that could only be committed by military personnel, such as desertion and disobedience of orders.

67. **Sir Nigel Rodley**, supported by **Mr. O'Flaherty** and **Mr. Lallah**, suggested that the word "often" in the third sentence should be replaced by the word "generally" so as to better reflect the Committee's basic position that the jurisdiction of military courts over civilians was incompatible with the Covenant.

68. **Mr. O'Flaherty** suggested adding the words "criminal or military" to the end of the first sentence. The fourth sentence seemed only to weaken the impact of the third and could be deleted. The last sentence seemed very far-reaching and he asked whether the Committee's jurisprudence supported the view that military courts should try only military offences; the practice in many countries was for such courts also to deal with offences under the ordinary law committed by military personnel.

69. **Ms. Wedgwood** suggested that the word "normal" in the fourth sentence should be replaced by the word "civilian". With regard to the second and third sentences, she noted that the distinction between military and civilian personnel was becoming increasingly hazy for a number of countries were hiring civilians to perform certain functions previously performed by military personnel. Those civilians occasionally committed offences and had to be brought to trial. It was not clear, however, what the proper jurisdiction was. The wording needed to show more latitude in order to reflect actual practice.

70. **Mr. Amor** said that there needed to be a reference, early in the paragraph, to customary law courts and judges, which were so prevalent in developing countries. He suggested inserting, before the second sentence, the sentence: "The Committee notes the existence in some countries of customary institutions that exercise a judicial function and whose operation requires the respect for guarantees that justice will be well served."

71. **Mr. Kälin** said he agreed to the addition of the words "civilian or military" at the end of the first sentence. There were problems, however, with insisting that article 14 of the Covenant must apply even to customary law institutions, as they were often mechanisms for conflict resolution at the local level rather than genuine courts. Such a comment would be too far-reaching, as many forms of conflict resolution, such as administrative justice institutions in companies and professional associations, did not observe article 14 guarantees, at least not explicitly. He would prefer to add the sentence proposed by Mr. Amor, which was more flexible. With regard to the last sentence, he personally saw nothing wrong with having military courts try military personnel for offences under the ordinary law, but the Committee did not seem to have agreement yet and further discussion was required. There seemed to be agreement in the Committee that the jurisdiction of military courts should be limited to military personnel. In order to deal with Ms. Wedgwood's point, wording could be added to the effect that the trial in military courts of civilians not performing military tasks was not compatible with article 14. The Committee's jurisprudence supported the view that the trial of civilians in military courts must be very exceptional and must follow rules and guarantees consistent with article 14 of the Covenant.

72. **Mr. Solari Yrigoyen** said that experience had shown that it was dangerous to allow military courts, which were beyond civilian control, to deal with offences under the ordinary law. Such offences, whether committed by civilians or military, should be tried in civilian courts.

73. **Sir Nigel Rodley** agreed with Mr. Solari Yrigoyen that military justice tended, in many cases, to strengthen impunity. The original wording had been designed to prevent that. A possible solution would be to refer to human rights offences.

The meeting rose at 1 p.m.